



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 8, 1995

Mr. Richard D. Monroe  
Deputy General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Building  
125 East 11th Street  
Austin, Texas 78701-2483

OR95-359

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30662.

The Texas Department of Transportation ("the department") received a request for "a copy of the updated rules of guardrail standards and designs" on November 16, 1994. The department requested a decision from this office about whether it may withhold the requested information from required public disclosure under section 552.103 of the Government Code on November 30, 1994. We conclude that the department must release the requested information.

Section 552.301(a) of the Government Code provides that:

A governmental body that receives a written request for information that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. *The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the request.* [Emphasis added].

Since the department received the request on November 16, 1994, and requested a decision from this office on November 30, 1994, the department failed to seek our decision within the ten-day period mandated by section 552.301(a). Because the department did not request an attorney general decision within the deadline provided by section 552.301(a), the requested information is presumed to be public information. Gov't Code § 552.302; see *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ).

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The department has not raised any specific compelling reasons to overcome the presumption that the information is public. The department asserts that section 552.103 of the Government Code is applicable. When an exception to disclosure that is designed to protect the interests of a third party is applicable, the presumption of openness may be overcome. See Open Records Decision No. 552 (1990).<sup>1</sup>

Section 552.103 does not protect the interests of a third party. Rather, section 552.103 protects the litigation interests of a governmental body. See Open Records Decision No. 551 (1990). The fact that the requested information falls within the section 552.103 exception does not alone constitute a compelling reason sufficient to overcome the presumption of openness that arises when a governmental body fails to request an attorney general decision in a timely manner. See Open Records Decision No. 591 (1991) at 2 n.2.

You state in your letter to this office that "[w]hen Mr. Roberts submitted the request, we did not know of any notice of claim, since the notice was filed some days subsequent to the request." You argue that "[t]o allow an attorney to 'lie behind the log' [and] file an open records request, and then, after the ten (10) day period during which a state agency may file an open records opinion request has passed, hit the agency with a notice of claim under the Texas Tort Claims Act (see Sec. 101.101 of the Civil Practice and Remedies Act) in order to, in effect, conduct discovery for a lawsuit, is an abuse of the Open Records Act, a circumvention of the civil discovery rules, and as such should not be permitted." Thus, the question becomes whether a governmental body's litigation interests are a compelling reason sufficient to overcome the presumption of openness when those interests arise upon receipt of a notice of claim letter after the ten-day deadline for requesting an open records decision has passed.

You inform us that the department received the notice of claim letter on September 26, 1994. Since the department received the request for information on November 16, 1994, over six weeks after it had received the notice of claim letter,

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<sup>1</sup>The presumption of openness may be overcome if the requested information is made confidential by another source of law. See Open Records Decision No. 150 (1977).

we need not address whether a governmental body's litigation interests constitutes a compelling reason sufficient to overcome the presumption of openness in a situation in which a notice of claim letter is received after the passage of the ten-day deadline. But again, the interest you seek to protect in your argument are those of the department, not a third party. The exceptions in the Open Records Act that are designed to protect the interests of a governmental body must be raised in a timely manner or they are waived. *See* Open Records Decision No. 630 (1994). *But see* Open Records Decision No. 586 (1991) (when governmental body has missed ten-day deadline, need of another governmental body to withhold requested information may provide compelling reason for nondisclosure in certain circumstances).

You have provided no other compelling reason to overcome the presumption that the requested information is open. Accordingly, we conclude that the department must release the requested information.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Kay Guajardo', with a long horizontal flourish extending to the right.

Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/rho

Ref.: ID# 30662

Enclosures: Submitted documents

cc: Mr. Nick C. Roberts  
Attorney at Law  
907 South Congress Avenue  
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(w/o enclosures)